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No. 88-1059

In The
Supreme Court of the United States
October Term 1988

VROOM DEVELOPMENTS (FLORIDA), INC.,
Appellant,

vs.

TOWN OF LONGBOAT KEY,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

MOTION OF APPELLEE THE TOWN OF LONGBOAT KEY TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the lower Florida courts correctly determined that the Town of Longboat Key's application of Ordinance 81-27 complied with all pertinent state and federal constitutional requirements.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	2
ARGUMENT	4
INTRODUCTION	4
I. The Application of Ordinance 81-27 to Vroom's Development Results in a Constitutionally Acceptable Fee	5
II. The Fee Computation Requirements of Ordinance 81-27 are Constitutionally Valid	6
III. Vroom's Due Process and Equal Protection Guarantees Were Fully Considered by the Lower Courts Through Their Analysis of the Rational Nexus Test	7
CONCLUSION	9
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606, *cert. dismissed*, 404 U.S. 878 (1971) 5, 7

Brookhill Development, Ltd. v. City of Waukesha, 299 N.W.2d 610 (Wis. App. 1980) 5

Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) 5, 7

Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (en banc) 5

Coulter v. City of Rawlins, 662 P.2d 888 (Wy. 1983) 5

Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979) 5

Florida High School Activities Ass'n v. Thomas, 434 So.2d 306 (Fla. 1983) 7

Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983) 7

Homebuilders and Contractors Ass'n of Palm Beach County, Inc. v. Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983) *pet. for rev. denied*, 451 So.2d 848 (1984) 7

Nollan v. California Coastal Commission, — U.S. —, 107 S. Ct. 3141 (1987) 8

CONSTITUTIONAL PROVISIONS:

FLA. CONST. art. 1, § 2, § 9 7

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND ORDINANCES:

Ordinance No. 81-27, Town of Longboat Key 2, 5, 6, 8

ARTICLES AND TREATISES:

Juergensmeyer, Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. St. U. L. Rev. 415 (1981) 7

No. 88-1059

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VROOM DEVELOPMENTS (FLORIDA), INC.,

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TOWN OF LONGBOAT KEY,

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ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

MOTION OF APPELLEE THE TOWN OF LONGBOAT KEY TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, appellee the Town of Longboat Key ("Town") moves to dismiss the appeal of Vroom Developments (Florida), Inc. ("Vroom"). The motion to dismiss is based on appellant's failure to present a substantial federal question to this Court. In the alternative, the Town moves under Rule 16.1(d) to affirm the judgment of the Florida Second District Court of Appeal, entered June 24, 1988 and reported at 531 So. 2d 974 (Fla. 2d DCA 1988). This opinion affirmed, per curiam, the judgment of the trial court on the ground that the decision below is manifestly correct and does not present a substantial federal question warranting plenary briefing and argument on the merits.

STATEMENT OF FACTS

This case arises out of a garden-variety developer's dispute with a town's land development regulations requiring the dedication of land for parks and open space. The Town of Longboat Key has operated a program for many years to ensure that sufficient park and recreational land facilities are available to meet the needs of both existing and new residents. The challenged regulation, Ordinance 81-27 (the "Ordinance"), provides a method by which the Town can acquire land for parks and open space to serve the Town's expanding population.

The Ordinance requires that developers of land must deed to the Town five acres of land for every one thousand persons to be added to the Town's population as a result of the proposed development. Vroom stipulated at trial that the standard of five acres per 1000 persons is reasonable, and does not challenge that standard here. App. 23. This standard is expressed in a formula contained in the ordinance that results in a dedication requirement of one hundredth of an acre for each residential dwelling unit in the proposed development.

The Town had earlier adopted an Open Space Master Plan (the "Plan") to aid developers and Town officials in identifying those lands most suitable for Town acquisition. The Ordinance provides that the developer may dedicate land designated in the Plan, or may pay a fee-in-lieu of the land requirement. If the fee in lieu of the land dedication is paid, the fee amount is based on the fair market value of the amount of acreage required by the formula. The per acre value is based on the value of the land to be developed.

Rather than dedicate land, Vroom opted to pay an in lieu fee of $61,962.35 for its twenty-six unit Longboat Cove condominium project on August 25, 1980 and a $21,-448.44 in lieu fee for its nine unit condominium Pelican Harbor project on January 29, 1981. Neither of these projects contained lands recommended for purchase in the Plan. There is no evidence in the record that Vroom attempted to dedicate land either on its property or otherwise in the Plan to satisfy its land dedication requirement. Nor is there evidence that Vroom requested an amendment to the Plan, as others have done in the past, to add to the Plan other land suitable for acquisition by the Town and otherwise available to Vroom for dedication.

Vroom paid the in lieu fee to the Town under protest and subsequently filed a declaratory judgment action on October 4, 1984. Vroom alleged that the Ordinance violated constitutional guarantees of due process and equal protection, that it was unconstitutionally vague and indefinite, that it constituted a taking, and that it was an invalid tax.

Vroom's position at trial was that in order to meet constitutional requirements, the in lieu fee must be based on the value of those specific lands recommended for purchase in the Plan. Its expert appraisal witness testified that the value of such land per square foot was $1.00, although he admitted that he appraised only one parcel on the Plan and had not made a determination of the value of the total amount of land that the Town should acquire. App. 2-3, 5. Vroom's expert furthermore testified that the only method he would advise for calculating the fee was the method used by local governments to calculate special assessments. App. 4, 5, 17-19. The Town's expert testified

that this method was not used for purposes of land dedication ordinances by any local government of which he was aware. App. 19. Vroom's expert presented no evidence in rebuttal to the Town's expert's testimony.

The evidence at trial established that Vroom's fee offset, but did not exceed, the park and open space needs attributable to Vroom's two projects. The fee paid by Vroom, using the value of the land to be developed, was no greater than the per dwelling unit cost of parks and open space currently provided the existing population. App. 13, 14. The trial court accepted the testimony of appellee's expert land economist that the Town's fee was reasonable, based on an accepted methodology for fees of this kind known as the "per capita" or "replacement" methodology. App. 7-13, 15, 16. The Town's ordinance thus was shown to meet the constitutional requirements of rationality, as it was reasonably related to the cost of serving needs created by Vroom's new development.

ARGUMENT

Introduction

Vroom has failed to present any substantial federal issue to this Court. This already overburdened Court should not accept jurisdiction of this common land use dispute simply to "reinforce the fact that citizens of this nation have federal constitutional rights separate from, and independent of, state constitutional rights." J.S. at 9. Vroom's federally secured rights of due process and equal protection were fully considered by the lower state courts. There remains no issue worthy of this Court's attention.

I. The Application of Ordinance 81-27 to Vroom's Development Results in a Constitutionally Acceptable Fee

The Town's application of its land dedication ordinance is typical of ordinances used and accepted throughout the country requiring land dedication or in lieu fees. In those ordinances, the in lieu fee is calculated on the basis of the fair market value of the amount of land on site that otherwise would be required to be dedicated. *See Associated Home Builders, Inc. v. City of Walnut Creek,* 484 P.2d 606, *cert. dismissed,* 404 U.S. 878 (1971); *Coulter v. City of Rawlins,* 662 P.2d 888, 893-894 (Wy. 1983); *Call v. City of West Jordan,* 606 P.2d 217 (Utah 1979); *Collis v. City of Bloomington,* 246 N.W.2d 19 (Minn. 1976) (en banc). *Cf., Brookhill Development, Ltd. v. City of Waukesha,* 299 N.W.2d 610 (Wis. App. 1980) (fee in lieu of school land dedication). The lower courts properly rejected Vroom's argument that the only reasonable method for calculating the fee is to follow the method used for establishing special assessments. Special assessments for specific local projects are easily distinguishable from other regulatory fees enacted to pay for the costs of capital expansion required by new development. *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin,* 329 So.2d 314, 319 n. 8 (Fla. 1976), *cert. denied,* 444 U.S. 867 (1979).

Vroom's fee did not exceed the cost of providing the capital facilities required by its development. It is, in fact, less than what it would cost the Town to replace, on a per capita basis, the existing park and open space land acquired by the Town. That is all the due process and equal protection to which the developer is entitled.

Vroom's fee—$2,762.00 per dwelling unit—did not exceed $2,996.00 per dwelling unit, which was the Town's current per dwelling unit investment in parks and open space. App. 9-11. Contrary to the suggestion in its first question presented, Vroom paid no more than its pro rata share of capital facilities required by its development.

II. The Fee Computation Requirements of Ordinance 81-27 are Constitutionally Valid

Vroom's second question presented claims that the Town Ordinance is unconstitutional because it "exacts the fee based upon the value of the development land." Vroom has misread the ordinance to state "that an impact fee shall be based upon the value of the designated park land" and claims that the Town has thus invalidly applied the Ordinance.

Section 9.e. of the Ordinance clearly contemplates that the Town may wish to accept "other lands" than those on the Plan. The Town has in fact accepted such other lands when offered. App. 25. R. 163. Vroom confuses a Town preference for lands on the Plan for a prohibition against accepting lands that are not on the Plan. The courts below properly read the Ordinance to require that the fee-in-lieu be based on the fair market value of the land to be developed, and found this requirement to be constitutionally valid. The significance of the Plan is that it provides guidance to the Town and to developers who may wish to purchase and dedicate those lands to satisfy the parks and open space needs of new development. The lower courts properly did not require the Plan to be used in any other way and neither, as a constitutional matter, should this Court.

III. Vroom's Due Process and Equal Protection Guarantees Were Fully Considered by the Lower Courts Through Their Analysis of the Rational Nexus Test

The rational nexus test employed by the Florida Court and other courts throughout the nation to test the constitutional validity of in lieu fees is not simply "a state constitutional test." J.S. p. 7. It is a test designed to insure that developers pay no more than their fair share of the amount needed to fund capital facilities necessitated by their developments. *See e.g., Home Builders and Contractor Association of Palm Beach County, Inc. v. Palm Beach County,* 446 So.2d 140 (Fla. 4th DCA 1983), *pet. for rev. denied,* 451 So.2d 848 (Fla. 1984); Juergensmeyer, Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. St. U.L. Rev. 415 (1981). It thus is designed to inherently consider the very due process and equal protection concerns raised by appellant. *Id.; Hollywood, Inc. v. Broward County,* 431 So.2d 606, 610-612 (Fla. 4th DCA 1983); *Associated Home Builders, Inc. v. City of Walnut Creek,* 484 P.2d 606, *cert. dismissed,* 404 U.S. 878 (1971); *Call v. City of West Jordan,* 606 P.2d 217 (Utah 1979). This is especially true since Florida's due process and equal protection guarantees are virtually identical to the federal guarantees on which they are based. FLA. CONST. art. 1, § 2, § 9. Indeed, federal due process and equal protection decisions are often cited as dispositive precedent in cases construing Florida's corresponding guarantees. *See e.g., Florida High School Activities Ass'n. v. Thomas,* 434 So.2d 306, 308-09 (Fla. 1983).

Moreover, the rational nexus test employed by the Florida courts is substantially the same as the federal con-

stitutional test applied to a land dedication ordinance in *Nollan v. California Coastal Commission,* — U.S. —, 107 S. Ct. 3141 (1987). In *Nollan,* the court stated that its constitutional test "is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts," citing to a Florida case which applied the rational nexus test. *See* 107 S. Ct. at 3141. Indeed, the cited case reviewed the earlier Longboat Key parks and open space land dedication ordinance under the rational nexus test applied in *Hollywood, Inc.* Thus, the lower courts' review under the rational nexus test in this case could hardly fall more squarely into the constitutional review standard established by this Court.

Vroom's third question presented thus reflects a complete misunderstanding of the rational nexus test. An analysis of Ordinance 81-27 under the rational nexus test incorporates the same analysis as that for a federal constitutional challenge. The trial court found there to be no violation under state or federal constitutional law, and the appellate court affirmed without opinion. The constitutional questions have been presented, considered, and rejected by every court to examine this action. Vroom has completely failed to articulate a reason for this Court to accept jurisdiction of this common and unimportant developer's dispute.

———o———

CONCLUSION

For the foregoing reasons, Vroom's appeal should be dismissed, or in the alternative, the decision of the Florida Second District Court of Appeal entered June 24, 1988 should be affirmed.

Respectfully submitted,

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January, 1989

APPENDIX

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

VROOM DEVELOPMENTS (FLORIDA), INC.,

Plaintiff,

-vs- Case No. 84-3836

TOWN OF LONGBOAT KEY,

Defendant.

_____/

Transcript of the proceedings in the above-entitled cause before the Honorable Andrew Owens, Circuit Judge, at the Sarasota County Courthouse, Sarasota, Florida, on January 14, 1987.

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INDEX

WITNESSES, PLAINTIFF'S PAGE

LARRY SEWELL

Direct Examination by Mr. Syprett 27
Cross Examination by Ms. Stroud 51
Redirect Examination by Mr. Syprett 64

WITNESSES, DEFENDANT'S

JAMES NICHOLAS

Direct Examination by Ms. Stroud 68
Cross Examination by Mr. Syprett 107

ANN SATTERTHWAITE

Direct Examination by Ms. Stroud 131
Cross Examination by Mr. Syprett 144
Redirect Examination by Ms. Stroud 147

WITNESS, REBUTTAL

MARK GUMULA

Direct Examination by Mr. Syprett 150
Cross Examination by Ms. Stroud 161
Redirect Examination by Mr. Syprett 161

• • •

(p. 52) Jew Fish Key and Lyons Lane?

A No. I have seen one of the appraisals but I did not conduct a formal review.

MR. SYPRETT: Your Honor, the other appraisals to which he's making reference are contained in our Exhibit No. 9.

Q (BY MS. STROUD) But the only lands you actually appraised were Lyons Lane and Jew Fish Key?

A Jew Fish Key I didn't actually appraise it, it was strictly a review.

Q So, you appraised one of the lands designated on the open space master plan?

A Yes, Ma'am.

Q And in terms of the value of other lands on the open space master plan, did you make a determination of that value?

A No, I did not.

Q So you do not then have an idea of what the value of the total amount of land that the Town of Longboat Key wishes to acquire is?

A To the best of my knowledge no one has formally appraised that, so I don't have that figure.

Q Do you know what the current Town inventory of parks and open space lands is?

A I have seen a figure. I don't recall off the top (p. 53) of my head, but I have seen that.

Q But which parcels of land on that open space master plan are currently owned by the Town of Longboat Key?

A I have also seen a document that illustrates the properties owned by the Town of Longboat but I don't have that in my possession. Mr. Syprett may have that with him.

Q Did you make a calculation or appraisal of the value of the land that is owned by the Town of Longboat Key and used for parks and open spaces?

A No, I did not.

Q Have you made an appraisal of the value of the improvements on park or open space land that the Town of Longboat Key has acquired?

A No, I have not.

Q You have testified as to a way to calculate an impact fee or a fee in this case to acquire land and open spaces. Is that the only way, to your knowledge, that there is to calculate such a fee?

A If you were attempting to realistically charge people for what is truly being acquired, it is the only way I can even advise.

Q Have you ever worked for a local government and assisted them in the preparation of a land dedication ordinance?

A I worked a little with Dr. Nicholas in density (p. 54) transfer situations which, I believe, was a part of a dedication, but that was for Lee County, but to any extent, not much of any.

Q So, you have never been responsible for making a calculation for a fee for parks and open space for any local government?

A I have appraised a number of properties for the local government when they are doing it, but they do the mathematics.

Q You have never been employed to assist a local government in determining a proper methodology for a park and open space land dedication fee?

A Not to my knowledge, no, I have not.

Q Have you had any formal training or experience outside of the State of Florida in determining what is the proper methodology for a land dedication fee?

A Outside the State of Florida, no, I have not.

Q Have you ever been employed by a local government in Florida to assist them in the methodology for establishing an impact fee?

A No, I have not.

Q Are you aware of the difference between an impact fee and a land dedication ordinance?

A Not from a legal standpoint, no.

Q From any standpoint?

• • •

(p. 63) Q Have you made any calculations of the value of that one hundred and twenty-six acres that should be acquired?

A That would have to be done before I could tell you how much the impact fee should be.

Q And you have not done that?

A I have not done that.

MS. STROUD: Thank you, Your Honor.

MR. SYPRETT: Your Honor, the documents, for your information, that have been admitted into evidence show areas mapped for acquisition that total probably two hundred and twenty acres, and that is contained in the

testimony that has been put in as an exhibit, so the shaded areas that are shown on this map total almost one hundred acres more than can be legitimately acquired under the impact fee ordinances that we are talking about because the Town's standards still only allow for acquisition of one hundred and twenty-six based on five acres, which is what they said each one thousand needs. So, much of the open space you're looking at has to be acquired under other approaches, and I would have just about three or four questions for Mr. Sewell.

• • •

(p. 84) THE COURT: I think that would really go to legal argument, so I'll go ahead and let him testify.

Q (BY MS. STROUD) In order that we are clear about the procedure by which you have determined this acreage currently existing in Longboat Key for park and open space purposes, can you briefly summarize again what your procedure for coming up with that figure was?

A First, we simply went to the inventory and found out that there is currently existing one hundred and eighty-seven acres of park and open space. By referring to the 1980 census together with the building permit reports filed to determine that as of 1984, the last year for which there is complete data, there were six thousand six hundred dwelling units, residential units, on Longboat Key. At 2.01 persons per unit it yields a population of thirteen thousand two hundred. One hundred and eighty-seven acres for thirteen thousand two hundred people is approximately fourteen acres per one thousand population. That is what the Town of Longboat Key is presently doing.

But, more importantly, Your Honor, at least as to my calculations, is when we look to what is the worth of those one hundred and eighty-seven acres, of course we have several bases to do it, one is we look back to what the Town actually paid for some reasonable proxy thereof which would be the assessed value (p. 85) of the open spaces, and the land area is worth fifteen million dollars.

MR. SYPRETT: Excuse me, Your Honor, I'm going to object to the witness testifying to land value because I don't think he has been qualified as an appraiser for land value purposes, and unless we are given some source of the basis for the figures, it must be presumed that he is testifying as to land value.

MS. STROUD: Your Honor, Dr. Nicholas has been offered and accepted as an expert in land economics, and if Mr. Syprett would like, we will ask Dr. Nichols about the sources bases of his calculations, but I believe this is entirely relevant and competent testimony.

MR. SYPRETT: If he has not been tendered as an appraiser and she's calling on him for appraisals, then I think he needs to be further qualified. He was qualified in the category that she referred to, nor is he licensed as a broker yet to testify to in the record which one of the fields. In essence, one of the functions of a real estate broker is the ability to do appraisals and appraise other persons' lands and to testify to that (p. 86) fact, and that has not been established.

THE COURT: I don't know how you can be a land economist without dealing with the value of the land. Since he was recognized as a land economist, I assume his opinion would have to be based on the appraisals, and if

you wish to show they are inaccurate. I think you would be entitled to do that, but at this point I will allow him to go ahead and testify.

Q (BY MS. STROUD) Dr. Nicholas, you had begun to explain a procedure by which now shifting over from the area type of valuation you went to a value of property valuation. Can you explain to the Court the procedure in which you did that calculation?

A First, we got the areas from the Town inventory of the property they own or that were owned by other entities that made them available for parks and open space. The values here were one of three sources. One source would be the actual acquisition cost that the Town had paid from those records. Second would be appraisals made, I believe in every case, at the initiation of the Town by an appraiser, a qualified appraiser. The third source is the tax roles, the appraised value as stated on the tax roles. So I attempted to do no appraisals on my own but made use of (p. 87) those sources. When we sum them, the land in current inventory is worth fifteen million dollars. For six thousand six hundred dwelling units that is an average per dwelling unit of two thousand seven hundred and forty-seven dollars. That is strictly dealing with land. Or it is a value per acre that is two thousand two hundred and seventy-six dollars per dwelling unit as it exists, or per acre eighty thousand two hundred and eighty-one dollars.

The second point I wish to make here is that some of these appraisals were made as late as 1973 or as long ago as 1973. Some of the properties were acquired in 1980 or before. The property appraiser in Manatee County

has not changed the appraisals of these publicly owned properties since 1984. I am somewhat concerned that this was an extremely conservative, in fact, perhaps even to the point of being a biased assessment of value, so I attempted to bring these forward to a current value and all I did was use a simple ten percent per year since the indicator of value is to try to establish a base, and which is also called a current value. The current value of the properties would be eighteen million or fifteen million. The value of these properties per dwelling unit would be two thousand seven hundred and sixty-two dollars, and the value per acre would be ninety-seven thousand four hundred and twenty-four dollars, again emphasizing we are looking here strictly at (p. 88) the properties that are currently in inventory.

MR. SYPRETT: Excuse me, Your Honor, I would object to that and move to strike. He's bringing forth the values on that because that did require effectively a property appraisal by him to do so.

THE COURT: All right. I'll deny that. I think it all goes to credibility.

Q (BY MS. STROUD) Dr. Nicholas, is it your testimony that the twenty-seven hundred eighty-two dollar figure that you just mentioned was an average cost per dwelling unit?

A Yes, that's an average of all the six thousand six hundred dwelling units on Longboat Key.

Q Did you calculate a cost on the Plaintiff's Longboat Cove and Pelican Harbor projects?

A Yes.

Q Can you explain to the Court how you did that?

A Of course. When we look at an average, we recognize that there are effects around the average, you look at the nature of these particular properties and they would fall generally in the low to mid-rise development, two and three bedrooms and relatively large dwelling units. What we know from the census and numerous other studies that the larger the unit in terms of the number of bedrooms, (p. 89) the more people generally occupy that unit. Additionally, the larger the unit in square footage, the more people tend to occupy it. Referring back to the 1980 census of housing, we can determine the number of people we would expect to live in a mid-rise two bedroom and a mid-rise three bedroom home on Longboat Key, and doing that the average of all of the units developed here you would expect to get 2.077 persons per unit as distinct from the average of 2.01 for the Town, so it is simply recognizing these units developed here are slightly greater in size and, therefore, demographic impact than the average.

Q Using a 2.077 estimated population per unit on Longboat Cove or Pelican Harbor, what would be the cost under your cost calculations for those properties?

MR. SYPRETT: Excuse me, I object to that. It is irrelevant and immaterial because the ordinance uses 2.01. That is what the effect is calculated on, what the fee is based on.

THE COURT: You may be right. I'm just hearing it for the first time. I'll have to weed that out, if you are correct, but I think it is appropriate at this time and I

will allow him to present that. You may very well be correct in your position that the Court should not consider that. Go ahead.

(p. 90) A The unadjusted value is simply looking at prices paid when acquired or assessed value would go from two thousand two hundred and seventy-six dollars per dwelling unit to two thousand three hundred and fifty-two. The current estimate would go from a dwelling unit cost of two thousand seven hundred and sixty-two to two thousand eight hundred and fifty-five dollars for the Longboat Cove or Pelican Harbor units.

THE COURT: I didn't understand that.

A These units are slightly larger, Your Honor, and we would expect them to have slightly more people. Therefore, if we're going to provide five acres per thousand, we would expect them to have a slightly higher cost than the average.

THE COURT: All right.

Q (BY MS. STROUD) In your study of the cost of providing open space and park land in Longboat Key did you determine a value of improvements for that park and open space land?

A I attempted to try to.

Q Please explain how you did that study.

A To begin with a park or open space is more than simply the land area. It includes various improvements, parking spaces, walkways, et cetera. In our inventory of the Town facilities we do not have an accurate inventory of (p. 91) what improvements have been made. I was

only able to identify with specificity two improvements. First would be the value of the construction of the bike paths, which is eight hundred and forty-four thousand dollars, and second, is the cost of constructing the dune walkovers, which are fourteen at fifty thousand dollars each, for a total cost of seven hundred thousand dollars. Therefore, Your Honor, the improvements which currently exist that I was able to identify are equal to one thousand five hundred and forty-four dollars.

MR. SYPRETT: For the record, Your Honor, I renew my objection. It is irrelevant and immaterial. It is not part of the specified lands or referred to in the ordinance.

THE COURT: Thank you.

Q (BY MS. STROUD) To be clear, the one thousand and more figure that you just cited, would you cite that figure again?

A The known improvements is what I'm calling them, one million five hundred and forty-four thousand dollars.

Q Using those total known improvement costs, did you calculate a value per dwelling unit of those costs?

A Yes, I did.

Q What was the result of your calculation?

A Aggregating the land costs with the improvement (p. 92) costs the average dwelling unit which, Your Honor, would be equivalent to 2.01 population figure, using the acquisition cost basis for the land, the cost per dwelling unit was two thousand five hundred and ten dollars. Bringing the land cost up to current value, the average

cost, again on the 2.01 figure, would be two thousand nine hundred and ninety-six dollars. If we look at the cost of the Town to a slightly larger unit, that is in the case of Pelican Harbor, those costs would now be on the base value or original cost of the land two thousand five hundred and ninety-four dollars, current value of the land three thousand and ninety-six dollars.

Q Dr. Nicholas, in performing this study, did you use facts and data that are reasonably relied upon by expert land economists in performing studies of this type?

A Yes, I used the U.S. Census, I used building permit reports, which are federal documents, I used appraisals, which I believe are all in the record, and I used other matters, the public records such as the assessed value of property, all very reasonable sources.

Q Based on your background, your training and expertise, your study of the parks and open space capital facility needs of the Town of Longboat Key, and your knowledge of the fees paid by Vroom Development, Inc., do you have an opinion as a land economist as to the

* * *

(p. 96) greater than the fees which Pelican Harbor or Longboat Cove were required to pay.

Q Dr. Nicholas, in doing your study is it your testimony that you used a population standard of 2.01 persons per dwelling unit to derive an average cost to buy parks and open space per dwelling unit?

A Yes. When I simply refer to the cost per dwelling unit, that is the 2.01 standard as set out in the ordinance.

Q And will you explain, just to be clear to the Court and there is a continuing objection, what the bases of your cost calculations were?

A The cost calculations again were simply the summation of the area and the value of those properties divided by the number of dwelling units. So, here we simply have a per dwelling unit cost very simply, and at that point it makes no difference how many people are in it, divide fifteen million or eighteen million by six thousand three hundred. The ordinance, however, specifies that the average occupancy is 2.01, so that we can link those two together, which is what I would do there and which I did. However, when we start looking at what a specific individual paid, now that specific individual might pay an average payment, a below average payment or above average payment, so now we're not looking to generalities, we're looking to (p. 97) what a specific individual pays because we well know the fee can vary from unit to unit, and as I understood the question with respect to this property owner was what were the costs that the Town could expect to incur for this development rather than for the average development, so we have to look at the nature of the development, first, what did it pay, and, second, what would it cost to service. So, that's why I shifted from the average of 2.01 persons per unit to 2.077 to try to compare apples to apples here, what this particular property owner paid versus the cost the Town would incur. Otherwise, Your Honor, the scene would have to be average against average, when you're looking at what is the average cost at the same time we're looking at what is the average receipt. Alternatively if we're looking at what is a particular payment, we should be looking at what would

be the particular cost associated with that payment. That's the reason I did it in the manner in which I did it.

Q Dr. Nicholas, the method which you described to calculate both the average cost and the cost for this particular Plaintiff's property, is that method one that you have used in other local jurisdictions for studies of this type?

A Yes.

MR. SYPRETT: I object to that as irrelevant and immateril, Your Honor.

(p. 98) THE COURT: Overruled.

A Yes, I have done a number of park impact fee ordinances, and every park impact fee I have done has used this method, which is simply called the per capita method. It probably is the most commonly used method. In fact, of the existing park impact fee ordinances all use it to one extent or another.

Q In what jurisdictions have you used this method of calculating the cost?

A Monroe County, Broward County, Harden County, St. Lucie County, Lee County, Charlotte County, Hernando County, Citrus County. There are a couple of others, of course. I think I said Broward?

Q Yes. Thank you, Dr. Nicholas. Is the method that you described of having been used in Broward, was that method described to the Court in your expert testimony before the Court in the case of Hollywood, Inc., versus Broward County?

A Yes, the testimony I gave in that case was a per capita cost analysis, but then we look at how those costs

would vary by different types of dwelling units to try and show that there was an attempt at proportionality, recognizing that some units impose more costs than others, therefore, we would expect the fees should have some degree or proportionality as opposed to fixed that every dwelling

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(p. 101) Q (BY MS. STROUD) Dr. Nicholas, in your studies and work with impact fees are you familiar with a concept of replacement costs?

A Yes.

Q Can you explain to the Court how your methodology relates to this concept of replacement costs?

A This methodology is frequently referred to as replacement cost, that if the community were to double in size, we would expect we would have to totally replace through addition the existing park structure. That's where it came from, the replacement cost concept. But we would expect that as new people come in, as new development occurs, that they would maintain the park standard or simply replace their particular increment and then we would use the existing system as the basis to establish a standard.

Q Has this replacement cost method been used in your work for Palm Beach County?

A Yes.

Q Can you describe in what particular work in Palm Beach County it has been used?

MR. SYPRETT: I just want to reaffirm that my standing objection to all this line of questions still exists as to relevancy and maturiality.

THE COURT: I forget it, but now you have re-reaffirmed it I remember you were making all those

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(p. 103) cost of acquiring that future inventory land; secondly, a calculation was made on the build-out population expected in that local jurisdiction, with no particular date of that build-out population; assume the third step was calculating the per capita cost at build-out using those first two steps, and that per capita cost became then the fee charged to the new development to pay open space and recreation. Based on your background, training and experience in the conduct of public capital facility financing studies, would the study described be a valid approach to determining the share of the cost of capital expansion required because of new development?

A No.

MR. SYPRETT: I object to the form of the question and it's relevancy and materiality as worded and phrased because it deals with generalities, and the facts given aren't sufficient to make it relevant or material to the issues involved in this suit.

THE COURT: Overruled.

A Methodologically I find no fault with that. Methodologically it is a reasonable way to go about it. In fact, while that method is not used by any local governments I'm aware of in Florida, I personally would have

attempted to use it, was not able to. Methodologically, I think it is (p. 104) sound.

Q Do you have knowledge of a financing technique called special assessment?

A Yes.

Q What is the definition of a special assessment?

A It is a charge imposed upon benefitted property that recoups some or all of the costs incurred to create that benefit.

Q What is the method for calculating a special assessment?

A You define first the improvement to be delivered, and second create a role of the property to be benefitted, and in the amount of the benefit, and you divide through the cost by whatever unit you're using on the role, be it per acre, or per dollar of value or whatever, and then determine a charge for whatever unit you are assessing on the basis of it.

Q What similarity does that method have to the hypothetical set of facts that I presented to you?

A Well, generally speaking that is what one would do if one were going to use the special assessment approach to those costs. You would then have to identify specifically what was going to be acquired and put its value down, specifically who was to be benefitted. Then you divide the cost by the benefitted unit, and then the

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(p. 106) units, buyers toward single family homes. What is it going to be during the '90's? Will we see Town or any unit of build-out at zoned densities or not, are we going to see pressure toward rezoning, I don't know. What my work has always been structured to is to the development approach that responded to recognizing in the future things are going to change, rather than a role, if you will, here is what we're going to do, it's immutable, we think it is immuntable forever. I think there is a problem that, as I mentioned, Your Honor, I personally won't try to do one of these approaches where we're going to identify everything and add it all up, and I was soundly criticized, interestingly enough, mainly by the representative of the home building industry on the basis that it was speculative. How am I supposed to know, or anybody is supposed to know, in the future what parks are going to be needed, what their costs are going to be, how much development is going to occur. It's one of those reasons I personally totally avoid it. To the best of my knowledge, nobody uses that approach for an actual ordinance. It's commonly used for special assessments, for short term programs where you know exactly what you want, you can describe your role exactly. And that situation is very common. But an impact fee approach I've never seen it used.

Q Dr. Nichols, has it been your experience in your

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(p. 112) Q From whom did you get the figure that you used? You didn't get it from Solin?

A No, I went to the Census of Housing and used the 1980 census number of dwelling units. My second

source was to go to the building permit records of how many units had been permitted, added the two together and came up with six thousand six oh eight. I could not confirm the Solin figure, I did not use it.

Q The Solin figure is the City's figure that they apparently paid an extensive amount of money for; is that right?

A I'm not saying, yes, it's wrong; I'm simply saying I could not confirm it.

Q You did not run your figures using nine thousand rather than sixty-six hundred, did you?

A No.

Q This particular ordinance, the ordinances that we're dealing with here, adopted specific land which the Town desires to acquire, is that correct, on that map, or have you dealt with the map enough to be able to answer the question?

A I think you have two questions in one.

Q Does this map designate the land which the Town desires to keep as open space land?

A It designates land that the Town wishes to have (p. 113) as open space recreation.

Q This ordinance as well as that map was done to implement the open space plan; is that correct, excuse me, the 1978 comprehensive plan?

A I believe so, yes.

Q In section three of that it says, the following objectives shall constitute the Town's open space and recre-

ation policy; one, consider all wetlands part of the Town's permanent open space system; two, develop techniques for preserving vital areas in their natural state; three, develop passive parks for relaxation and nature study; and, four, consider amendments to develop regulations for mandatory dedication of park land or a payment in lieu thereof. Is that right?

A Um-hum (in the affirmative.)

Q Those are all objectives for the future acquisition of additional properties; is that correct?

A I concluded it to be that.

Q One can then take the open space master plan which had been adopted at the same time and look at the identified lands, determine which ones were already owned and then know which ones that comprehensive plan states as an objective they want the Town to acquire; is that correct?

MS. STROUD: Your Honor, I object to this

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(p. 116) future, does it not?

MS. STROUD: Objection, Your Honor. That's calling for a legal conclusion as to what the effect of the ordinance is. That is a subject for legal argument and not for Dr. Nicholas's testimony. In fact, Dr. Nicholas on direct has not put any evidence in at all about what the ordinance requires.

MR. SYPRETT: Much to my chagrin sometimes, Your Honor, expert witnesses can give opinions on the issue that is to be tried.

THE COURT: Yes, I understand that, but, in other words, as I understand the question you're asking is that they have this map and they show on this map the property they have already bought, and they show on the map the property that they want to buy, they have this purpose, and so, therefore, we have to just do the fees to buy just those properties; is that essentially where we're going?

MR. SYPRETT: For purposes of calculating certain fees in the future, yes. I'm ultimately going to get to that point, but I have to ask a couple of preliminary questions.

THE COURT: As I understood, Dr. Nicholas's testimony was, given the uncertainty that these (p. 117) things are always subject to amendment and so forth, so I would assume that you have got to start somewhere, and so that map would always be subject to change. Maybe I'm missing the point.

MS. STROUD: Your Honor, that is part of our legal argument, in fact, that the map is there as a guidance, and that's not anything on which Dr. Nicholas can testify. If he is asking the expert to assume certain facts—

THE COURT: I think Mr. Syprett can use Dr. Nicholas'. You have used Dr. Nicholas, he gets to use him free and you have to pay, but to testify in Mr. Syprett's theory of the case; I'm not sure which one I'm going to adopt as being correct, but at this point I will overrule your objection.

Q (BY MR. SYPRETT) Dr. in some of the record evidence that we have already put in, it is indicated to

us that these dark areas shown on the map for acquisition for open space total about two hundred and twenty acres. You have testified that one hundred and eighty-seven are already owned so much of that one hundred and eighty-seven apparently does no lie within these acres; is that correct?

A There are properties in open space recreation use

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(p. 135) light of the field in which she has been recognized as an expert in, it would seem to me all of her testimony would center around the standard of five acres per thousand people in population, if I'm not mistaken, and we have stipulated in our brief and otherwise with opposing counsel that we accept the standard of five acres per thousand as a reasonable standard, and that is the only standard dealt with in the ordinance, and the only acreage figures in the ordinance that have any relevance or materiality to any issue in the suit, so if that's the purpose of her testimony will be to establish that, then we have already stipulated to that and we advised opposing counsel of that quite a long time ago or quite sometime ago in days and weeks.

MS. STROUD: Your Honor, my purpose in bringing Mr. Satterthwaite is to explain to the Court the use of parkland dedication and fees in lieu ordinances which are commonly used in the field of recreational planning, and she is also available to testify to the standard of five acres per one thousand. If we are not permitted to put

in that testimony, that's fine, but I would like to bring Ms. Satterthwaite for that other purpose

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(p. 146) be landscaped.

Q That already exists out there, does it not?

A There is one six feet wide and they are thinking of widening it to eight feet because it has heavy use from joggers, walkers, bikers, so that may well be widened, and there is also a need for landscaping along it, and the Town is also considering putting a path on the other side of the Gulf of Mexico Drive.

Q On the open space master plan the bike route is not designated on that, is it, as, quote, land recommended for Town acquisition?

A No, but that master plan is what I consider a base guideline, and I think since that plan was prepared that bicycle path has proved so popular they recognize the need to improve it.

Q You do recognize the ordinance that adopted that master plan the lands designated on there as the ones to be acquired?

A That's right, but that I would consider a guideline, and the work that is needed is basically improvement, not necessarily land acquisition.

MR. SYPRETT: I don't have any other questions.

THE COURT: Do you have any redirect?

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(p. 163) Q But only thirty-four acres was taken for purposes of open space and the other twenty acres were taken for purposes of other capital improvements, were they not?

A I believe the way that read in the deed and donation agreement that the Town presented all of it was for open space purposes.

Q The Arvida agreement has been put into evidence. Referring to paragraph C on page four, it says as to the Town comprehensive plan and open space master plan adopted by the Town pursuant to the comprehensive plan shall be amended by the Town so as to accomplish the following; add to the Town's open space master plan that portion of the aforementioned fourteen acre tract which is not presently included in the plan, and simply delete another place that was. And on the dedication part of it here it says the fourteen acre parcel—excuse me—

MS. STROUD: Your Honor, may I ask where in the agreement?

THE COURT: You may.

MS. STROUD: On what page are you reading from the agreement?

THE COURT: Did you get that?

Q (BY MR. SYPRETT) So, having read that portion, does that sufficiently advise you that on the fourteen acres—

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